STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

Supreme Court No.152934
Court of Appeals No.321806
Circuit Court No.13-039031-FC

-v-

ERIC LAMONTEE BECK

Defendant-Appellant,
_____/

SAGINAW COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
MICHAEL SKINNER (P62564)
Attorney for Defendant-Appellant

PRO PER SUPPLEMENT TO APPLICATION FOR LEAVE TO APPEAL

BY: **Eric Lamontee Beck** by and Through **Michael Skinner (P62564)**
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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Eric Lamontee Beck moves for leave to appeal from the November 17, 2016 order of the Court of Appeals denying Defendant-Appellants application for leave to appeal in a six page unpublished opinion. /s/MTB,/s/HWS./s/JPH.

The Court of Appeals decision regarding the jail credit is unsupported by the facts of record included in this argument is the Sentencing transcripts, to help fully illustrate Defendants-Appellants contention.

Regarding the second issue presented to the Court for some unknown reason does not deal with the issue presented head on yet defers to the Jury in order to determine witness credibility and then cites *People v Harverson*, 291 Mich App 171, 175, 179; 804 NW2d 757(2010).

Harverson in its correct context deals with the issue as presented by the Defendant that being sufficiency of the evidence in order to prove the essential elements of the crime beyond a reasonable doubt. In essence and in the context that the Court of Appeals has utilized *Harverson* it is a misapplication of law.

The Court of Appeals has also somehow misconstrued essential facts of the case. In the Opinion from the court on paragraph 3 page 5 the court say's "And, *most notably*, Lyoyd-Deal testified that, after she heard a shot fired, she went to her window and she saw defendant shoot Pruitt three times". When in all actuality this is not contained in the record. Quite the opposite can be found; during the cross-examination of the Prosecutors witness. Cross examination of Officer: **DANIEL HERNANDEZ**: **Q**: What did she tell you? **A**: I just asked her If she knew what happened, and she said she heard three to four shots which sounded like they came from the

front of her house. And when she looked out all she saw was the victim lying on the sidewalk. **Q**: She didn't tell you anything else? **A**: That is all she told me, sir." (T I, 201)

And then the most mind-blowing statement of all contained in the record regarding witness testimony is presented by the Prosecutor himself:

Prosecutor MR.BOYD: "And maybe she did make another call, maybe she didn't. I don't know. I just don't know. I never looked into it. So that is just a detail there that is kind of thrown out as a red herring, it doesn't mean anything because what if she did? What if she didn't? *Does it make a difference on who she saw*? *Does it make a difference on who had the gun? Does it make a difference on who shot and killed somebody else? No*." (T I, p 110)

This Appellant-Defendant states that "yes" it does matter who she saw or if she saw any one at all. "Yes" it does matter who had a gun, and "Yes" it does make a difference on who shot and killed somebody.

And lastly the third issue presented regarding Loyd-Deal's testimony, the Court again brings forth an unfounded fact page 7 paragraph 2 "she observed defendant with a gun," this is not so and her initial "first impression testimony clearly states that she did not see who shot who. All she said is that she heard gunshots in the front area of her house and all she saw was the victim lying on the sidewalk.

The Court even helps this defendant by clearly stating that "every person is competent to be a witness except as otherwise provided in these rules." It is a matter of Fact and Law that Loyd-Deals testimony was inherently flawed and completely fulfills the meaning of the MRE presented. The testimony should have never been placed before the Jury for their determination.

For reasons, stated more fully in the accompanying brief, this Court should reverse or grant leave to appeal on the issues presented.

The decision of the Court of Appeals involves a substantial question as to the validity of a legislative act, is clearly erroneous, will cause manifest injustice to Mr. Beck, and conflicts with a Supreme Court decision MCR 7.302 (B) (1) & (B) (5). The issue raised involves legal principles of major significance to the state's jurisprudence MCR 7.302(B) (3).

Respectfully submitted,

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STATEMENT OF QUESTIONS PRESENTED

I. IS DEFENDANT IS ENTITLED TO 268 DAYS JAIL CREDIT ON THE INSTANT CASE, WHERE THE COURT ORDERED THE INSTANT CASE TO RUN CONSECUTIVELY WITH DEFENDANT'S WEAPONS FIREARMS POSSESSION BY FELON CONVICTION?

Court of Appeals answers, "No".
Defendant-Appellant answers, "Yes".

II. IS MR. BECK ENTITLED TO A NEW TRIAL WHEN THE EVIDENCE OF FELON IN POSSESSION OF A FIREARM AND FELONY FIREARM WAS INSUFFICIENT AND WHERE THE JURY WAS ALLOWED TO CONSIDER THESE CHARGES IN VIOLATION OF DUE PROCESS? IN THE ALTERNATIVE, WAS MR. BECK DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY HIS TRIAL ATTORNEY'S FAILURE TO MOVE FOR A DIRECTED VERDICT AND FAILURE TO FILE A MOTIN FOR A NEW TRIAL IN ORDER TO PRESERVE THE ISSUE OF A VERDICT THAT IS A RESULT OF A MISCARRIAGE OF JUSTICE?

Court of Appeals answers, "No".
Defendant-Appellant answers, "Yes".

III. WAS DEFENDANT-APPELLANT ERIC BECK WAS DENIED HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW BY ADMISSION OF THE IRRELEVANT AND HIGHLY PREJUDICIAL AND CONFUSING 911 RECORDINGS AND RECORDED AUDIO TRANSCRIPTS OF A DECEASED WITNESSES PRELIMINARY EXAMINATION TESTIMONY? IN THE ALTERNATIVE, WAS MR. BECK WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO OBJECT AND FAILURE TO FILE PRETRIAL MOTIONS TO HAVE WITNESS TESTIMONY SUPPRESSED?

Court of Appeals answers, "No".
Defendant-Appellant answers, "Yes"

STATEMENT OF FACTS

Mr. Beck was convicted by jury trial in Saginaw County Circuit Court of Felon in Possession and Felony Firearm 2nd, the Hon. James T. Borchard presiding. Mr. Beck was acquitted of Open Murder and some lesser offenses, including associated Felony Firearm charges. Despite the acquittal, the trial court sentenced Mr. Beck to an upward departure sentence based on its finding that Mr. Beck, in fact, committed the murder in question.

The case against Mr. Beck was based on (1) the fact of the death by criminal agency (gunshot wound) of Hoshea Pruitt. There was substantial testimony about, for instance, the autopsy and the crime scene investigation, although none of it provided any forensic evidence that linked Mr. Beck to the crime and none of it was really in dispute. (2) The testimony of Jamira Calais, who testified to driving by the crime scene, where she witnessed a group of men on the street, a shooting, and a man fleeing the scene. But she could not identify anyone involved. (3) Because she died prior to trial, the preliminary examination testimony of Mary Loyd Deal, in which Ms. Deal testified from a gurney, in substantial pain. She identified Mr. Beck as the shooter, but had multiple problems with her testimony: she had limited prior contact with Mr. Beck (she was able to identify him because she saw his picture on her niece's phone); she claimed to have seen Mr. Beck do the shooting, but at other times denied it and testified that she was in the kitchen and only heard the shots. The case rested, then, on the fact of the death and the shaky identification of a witness who was ill at the time of her testimony and had died by the time of trial. The jury acquitted of the murder charge.

The first witness was Saginaw Officer Lamar Kashat. 1/29/14 T 139. Around 11:30 pm on June 11, 2013, he responded to the shooting of Hoshea Pruitt. 1129114 T 140-42. Mr. Pruitt was taken away by medical personnel. 1/29114 T 142. There were bystanders, but no one he

identified as a suspect. 1/29/14 T 142-43. There was a bicycle at the scene, but he was not sure if it had a motor. 1/29/14 T 144.

The next witness was Saginaw Officer Michael Schrems. 1/29/14 T 145. He also responded to the scene. 1/29/14 T 146. He taped off the area, and then followed the ambulance to the morgue, where the Mr. Pruitt died. 1/29/14 T 147-78.He did not see a woman named Loyd Deal at the scene. 1/29/14 T 148.

The next witness was James Vondette, who was a Saginaw crime scene tech. 1/29/14 T 149. He described processing the scene. One item in particular at the scene was a smashed cell phone. 1/29/14 T 153. He did not try to identify the cell phone; he just bagged it. 1/29/14 T 156. He also seized a non-motorized dirt bike. 1/29/14 T 154. There was no identification on the bike. 1/29/14 T 156. He seized a t- shirt that was in a pool of blood. 1/29/14 T 155. He also seized a bullet that was smashed a little. 1/29/14 T 144. He did not find a weapon or shell casings. 1/29/14 T 155.

The next witness was Saginaw Officer Anthony Teneyuque. 1/29/14 T 158. He met with a potential witness the night of the shooting, Janira Calais. 1/29/14 T 159. Later, he took her to the police station to give a statement to the detectives. 1/29/14 T 160.

The next witness was Kanu Virani, the medical examiner for Saginaw County. 1/29/14 T 161. Mr. Pruitt dies of multiple gunshot wounds. 1/29/14 T 163.

The next witness was Jamira Calais. 1129/14 T 177. She was driving by the scene when it happened. 1/29/14 T 177-79. She saw a man in a white shirt get shot three or four times and a man in a black shirt run across the street afterwards. 1/29/14 T 182. She did not know either man. 1/29/14 T 182. She saw the man in the black shirt with a gun. 1/29/14 T 182. As the man in the black shirt ran by, she ducked and backed up her car, then she called the police. 1/29/14 T

184. She did not get a good look at the person in the black shirt and could not identify him. 1/29/14 T 185.She described him as African-American, late 30's, medium height, and well built. 1/29/14 T'186.

When she was stopped and witnessed the shooting, she was behind a turquoise car with both its reverse lights and brake lights on. 1/29/14 T 189. Nut the car was backing up a bit, enough that she honked the horn at it because she thought it was going to hit her. 1/29/14 T 189. She did not see anyone get into or out of the car. 1/29/14 T 190. There were more than just the men in the white and black shirts outside; including them, there were at least three to four people. 1/29/14 T 191. The shots happened with three seconds, and she believed they came from one person. 1/29/14 T 191-92. She described the shooter as a darker-skinner African American man. 1/29/14 T 193.

The next witness was Saginaw Officer Dan Hernandez. 1/29/14 T 194. He was one of the first officers on the scene. 1/29/14 T 196. He did not see Mr. Beck at the scene. 1/29114 T 199. He found a broken cell phone and a bike. 1/29/14 T 198. He did not find any weapons. 1/29/14 T 198. He did not determine who owned either item. 1/29/14 T 200. He found no evidence tying Br. Beck to the scene. 1/29/14 T 200. He spoke to Ms. Deal at the scene (whose house the incident happened in front of) and she said she heard three or four shots, looked out the window, and saw the decedent on the ground. 1/29/14 T 200-01.

The next witness was the Deputy Director for the 911 system, Barry Nelson. 1/30/14 T 5. The call was played. 1/30/14 T 8. He identified the 911 call from that night as coming from Jamira Calais. 1/30/14 T 8. Ms. Deal also made two calls to 911 that night. 1/30/14 T 9-19. There was a stipulation that all the 911 calls came in at about the same time (11:39 pm). 1/30/14 T 19-20.

The next witness was Aaron Fuse, an inmate with a current case and his brother is Mr. Beck's stepbrother. 1/30/14 T 21-23. He received a plea deal for his testimony. 1/30/14 T 22. A couple days after Pruitt was killed, he got a call from Mr. Beck. 1/30/14 T 26. Mr. Beck said he had done something really stupid and wrong, but was never specific about what he did. 1/30/14 T 26. Mr. Beck said he got into an argument over a girl and he did it. 1/30/14 T 27-28. Mr. Beck never said he murdered Pruitt. 1/30/14 T 32. Fuse has previous fraud convictions. 1/30/14 T 30. He was not friends with Mr. Beck and never did anything with him, yet Mr. Beck made this phone call to him. 1/30/14 T 31-32. He did not have his call history. 1/30/14 T 34-35. He at first denied that Mr. Beck admitted to shooting anyone, then agreed that he previously testified that he had. 1/30/14 T 35.

The next witness was Mary Loyd Deal, whose preliminary exam testimony was played because she had died by the time of trial. 1/30/14 T 50. On June 11, 2013, she was at home around 1030 pm with Hoshea Pruitt, Rajeana Drain and her son. PE 8-9. Mr. Beck came over. PE 9. She did not know him PE 9. Mr. Beck and Pruitt got into an argument, and Rajeana told Pruitt to leave. PE 9. They got into a fight, and she saw Mr. Beck shoot Pruitt. PE 10-11. She maintained that Mr. Beck shot Pruitt, but her testimony was inconsistent about the details of the night. PE 12-36.

The next witness was Saginaw Detective Brian Oberle. 1/30/14 T 69. The bicycle and cell phone at the scene were Pruitt's. 1/30/14 T 70. No weapon was recovered. 1/30/14 T 71. He interviewed Loyd Deal, and she said she was afraid to be seen talking to the police. 1/30/14 T 72-73. He met with her about noon the next day to take her statement. 1/30/14 T 74. She was a little bit better able to speak at that time than at the time of the preliminary exam. 1/30/14 T 74-76.

ARGUMENT

I. DEFENDANT IS ENTITLED TO 268 DAYS JAIL CREDIT ON THE INSTANT CASE OF FELONY FIREARM, WHERE THE COURT ORDERED THE INSTANT CASE TO RUN CONSECUTIVELY WITH DEFENDANT'S WEAPONS FIREARMS POSSESSION BY FELON CONVICTION.

STANDARD OF REVIEW. The "de novo" standard of review applies to issues of law, such as the right to jail credit on a sentence. See generally, *People v Johnson*, 205 Mich App 144 (1994).

PRESERVATION OF ISSUE

Appellant did not previously raise this issue in the trial court. However, a defendant may directly appeal an error of law involving a term of his sentence. See, e.g., *People v Cieslinski*, 139 Mich App 675; 363 NW2d 7 (1984) (jail credit); *People v Greenberg*, 176 Mich App 296; 439 NW2d 336 (1989) (restitution as condition of parole); *People v Wybrecht*, 222 Mich App 160; 564 NW2d 903 (1997) (only appellate court can invalidate sentence for lack of proportionality).

> A defendant who has received a consecutive sentence is not entitled to credit against the subsequent sentence for time served; rather, any such credit should be applied against the first sentence [People v Watts, 186 Mich App 686, 687-690; 464 NW2d 715 (1991)] Id. at 687.

Defendant must serve his felony-firearm convictions consecutive and prior to his convictions for the underlying felonies, see MCL 750.227BB, the trial court should have credited his time served against those convictions. See *People v Cantu*, 117 Mich App 399, 403-404; 323 NW2d 719 (1982).

Discussion

Days in jail. Defendant should have credit for all days in jail on the underlying charge. The original judgment shows 268 days of credit (*See Sentence Transcript page 11).* The most recent judgment of sentence, dated 5-01-2014, shows jail credit in the amount of 268 days. However, the judgment of sentence misapplies the credit to the wrong sentence it is clear as to its improper application of Jail Credit.

The Trial Judge at sentencing clearly states "*There is no credit*" (*see Sentence Transcript page 14*). The issue is also reinforced and compounded by the Pre-sentence investigation report. And in the time computation forms utilized by the Michigan Department of Corrections.

Legal Principles. The Double Jeopardy Clauses of the United States and Michigan Constitutions protect a defendant from multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Herron*, 464 Mich 593, 599 (2001). Thus, a defendant sentenced to prison is constitutionally entitled to credit for time served. *People v Sturdivant*, 412 Mich 92, 97 (1981).

The record is clear as to Mr. Beck's jail credit he is to receive credit for. It is in the amount of 268 days. He is entitled to it, as the language of the statute is mandatory. For these reasons, Defendant asks this Court to award him 268 days of credit on his sentence. Further, the jail credit statute, MCL 769.11b, mandates that Defendant receive credit, day for day, for all time spent in jail prior to conviction and sentence if he or she is unable to furnish bond or denied bond.

MCL 769.11b states:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

If Mr. Beck does not receive jail credit for pre-conviction time in jail, he is completely deprived of the time that was earned. See *People v Prieskorn,* 424 Mich 327, 341-342 (1985) and *People v Adkins,* 433 Mich 732, 746, 751 (1989) [mandating that defendants get time credited to their sentences for any time spent in jail on a particular case for which they are sentenced]. To deny credit is to violate the double protections mandated by the United States Supreme Court in *North Carolina v Pearce*, 395 US 711; 89 S Ct 2072; 23 L Ed 2d 656 (1969). In contrast to an inmate returned to prison who received jail credit, albeit on only the maximum sentence, Mr. Beck has received *no credit* for pre-trial jail custody at all on any sentence. Mr. Beck must receive the 268 days that he served in jail.

> A defendant who has received a consecutive sentence is not entitled to credit against the subsequent sentence for time served; rather, any such credit should be applied against the first sentence [People v Watts, 186 Mich App 686, 687-690; 464 NW2d 715 (1991)] Id. at 687.

Defendant asks that the lower court be ordered to enter an amended judgment granting proper credit in order to comply with Defendant's due process rights at sentencing. US Const, Ams V, XIV; Const 1963, art 1, § 17.

Conclusion. For the above reasons, Defendant asks this Court to award him, at a minimum, 268 days credit, or alternatively, remand this case for a complete re-evaluation of credit. The error is not harmless, and is plain from the record, clearly affecting Defendant's substantial rights.

ARGUMENT

II. MR. BECK IS ENTITLED TO A NEW TRIAL WHERE THE EVIDENCE OF FELON IN POSSESSION OF A FIREARM AND FELONY FIREARM WAS INSUFFICIENT AND WHERE THE JURY WAS ALLOWED TO CONSIDER THESE CHARGES IN VIOLATION OF DUE PROCESS. IN THE ALTERNATIVE MR. BECK WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY HIS TRIAL ATTORNEY'S FAILURE TO MOVE FOR A DIRECTED VERDICT AND FAILURE TO FILE A MOTION FOR A NEW TRIAL IN ORDER TO PRESERVE THE ISSUE OF A VERDICT THAT IS A RESULT OF A MISCARRIAGE OF JUSTICE?

Issue Preservation

Trial counsel did not make a motion for a directed verdict, nor did trial counsel file a motion for a new trial. Mr. Beck is entitled to a remand to the trial court under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

A claim of ineffective assistance of counsel may however, be raised for the first time on appeal if the details relating to the alleged ineffective assistance of counsel are sufficiently contained in the record to permit this Court to decide the issue. *Ginther*, at 443; *People v Cicotte*, 133 Mich App 630, 636; 349 NW2d 167 (1984). In the absence of an evidentiary hearing in the trial court, review on appeal is limited to mistakes apparent on the lower court record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Standard of Review

Whether there was insufficient evidence to send a charge to the jury is reviewed de novo. *Jackson v Virginia*, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560, 560 (1979); *People v Wolfe,* 440 Mich 508, 515; 489 NW2d 748 (1992); *People v Hampton,* 407 Mich 354, 368 285 NW2d 284 (1979). The court must take the evidence in a light most favorable to the prosecution and

determine whether it was sufficient to prove all essential elements of the crime beyond a reasonable doubt. *Id.* "Some evidence" on an element is not enough; that evidence must be sufficient to prove each essential element beyond a reasonable doubt. *Hampton*, at 368 & 377. Whether the sending of the case to the jury on higher-than-warranted charges is reversible error is also reviewed de novo. *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998).

Claims of ineffective assistance of counsel are reviewed de novo under the two-part analysis established in *Strickland.* Ineffectiveness claims present mixed questions of law and fact. *Strickland*, at 698; *LeBlanc,* at 579. Questions of law are reviewed de novo while questions of fact are reviewed for clear error. MCR 2.613(C); *LeBlanc*.

Argument

Eric Beck was charged with **1**.) Homicide Open murder in the death of Hoshea Pruitt. **2**.) Weapons felony firearms 2nd. **3**.) Carry Weapon w/Unlawful Intent. **4**.) Weapons felony firearms 2nd. **5**.) Weapons firearms possession by felon. **6**.) Weapons felony firearms 2nd. The prosecution presented three civilian witnesses, Mary Loyd Deal whom was deceased by the time of the trial, Jamira Calais, Aaron Fuse, six police officers, a medical examiner, the Deputy Director of 911 and a court recorder. None of the witnesses testified to seeing Mr. Beck kill Hoshea Pruitt.

Mary Loyd Deal

(Persecutors witness)

The testimony of civilian witness Mary Loyd Deal during a convoluted 911 call almost immediately after a shooting occurs: "all she knows", to the jury, you heard exactly what she told 9-1-1. She needs the police. There has been a shooting outside my home. When asked if she knew who did the shooting she says quote, *"I don't know who did it.*" She is asked again, "Is

someone actually shot?" And that is a quote and the answer is, "Ma'am, please, I am disabled. *I don't know."*(T II, p 102,103).

Jamira Calais

(Prosecutors witness)

Prosecutor Q: Did you get a good enough look at the person that you could identify the person? **A**: No, Sir. **Q**: Why not ? **A**: It was dark. (T I, p 185).

Cross Examination Q: Did you happen to notice anyone on the porch of that residence while you were stopped, or while you were observing this incident happen? **A**: No, I didn't. **Q**: Okay. Now, you were really close to this incident, weren't you? **A**: Yes, sir. **Q**: I mean you were within a matter of feet? **A**: Uh-huh. **Q**: You can't say that this man is the shooter? **A**: No, I can't. (T I, p 192).

Aaron Fuse

(Prosecutors witness)

Prosecutor Q: And , Mr. Fuse you're obviously in the Saginaw Count Jail, correct? **A**: Yes. (T II, p 21). **Q**: And you had negotiations with the prosecuting attorney's office regarding your case, is that correct? **A**: Yes. **Q**: And were there some concessions made to you regarding your possible sentence? **A**: *No, not that I know of.*(T II, p 21).

Cross Examination Q: Okay. Now I want to be clear, very clear about something. Eric Beck did not tell you that he murdered Hoshea Pruitt? **A**: No. **Q**: He did not do that? **A**: No. **Q**: Now police in this case, they did not contact you regarding the murder of Hoshea Pruitt, did they? **A**: No. **Q**: You contacted them? **A**: Yes. **Q**: From Jail? **A**: Yes. (T II, p 32)...

-cont. – **Q**: Now, I am not entirely sure what your testimony is. Is it your testimony that you did, in fact, receive a plea deal to come here and testify today? **A**: I didn't exactly receive a plea deal to come here today, no. **Q**: The offer that you received is not contingent upon you testifying here today? **A**: *Yes.* **Q**: Okay. In exchange for you testifying three of the felonies you were charged with were dropped, weren't they? **A**: *Yes*. (T II, p 33).

Trial attorneys closing argument RE: Aaron Fuse- "A convicted fraud who just got out of prison commits a whole bunch of new frauds, gets caught, and is desperately trying to avoid going back to prison. What does common sense tell you? It tells you he is a desperate man. And I think it might tell you more than that. I think it tells you the prosecution is desperate too. Why else would they bring someone else in here like that? (T II, 101,102).

Summation

In the final analysis without even getting into the meaningless fodder that was presented by means of six individual Saginaw Police Department, service members. It is inherently safe to say based on the record be it, police reports, 9-1-1 calls, witness testimony, preliminary exam transcripts, and trial transcripts , the evidence produced was far from sufficient to support any form of a conviction at all.

The defendant was charged with six counts. The jury was given the option of guilty of all, any one, any combination of these crimes, guilty, or not guilty. (T II, p 130).

The Due Process Clauses of the state and federal Constitutions prohibit a criminal conviction unless the prosecution establishes guilt of the essential elements of a criminal charge beyond a reasonable doubt. US Const, Am V, XIV; Const 1963, art 1, § 17; *In re Winship*, 397 US 358, 361-362; 90 S Ct 1068; 25 L Ed 2d 368 (1970). The reasonable doubt requirement is a

due process safeguard which was developed to protect citizens from "dubious and unjust convictions, which result in improper forfeitures of life, liberty and property." *Winship*, at 362. A conviction must be reversed if the evidence introduced was insufficient to satisfy a rational juror that each element of the offense had been proven beyond a reasonable doubt. *See Jackson v Virginia,* at 319.

In reviewing a claim based upon the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Hampton*, at 368; *People v Metzler*, 193 Mich App 541, 546-547; 484 NW2d 695 (1992); *Wolfe*, at 513. Stated another way, where the proofs, taken most favorably to the prosecutor, present no more than a choice between competing probabilities, a judgment of acquittal must enter. *United States v Saunders*, 325 F2d 840 (CA 6 1964); *United States v Wiley*, 534 F2d 659, 660 (CA 6 1976).

Even in the light most favorable to the prosecution, a rational trier of fact could not have found Mr. Beck guilty of felon in possession of a firearm and felony firearm.

Legal Standard for Felony Firearm "are that the Defendant possessed a firearm during the commission of, or attempt to commit, a felony." Can be actual or constructive, joint or exclusive." *People v Johnson*, 293 Mich App 79, 82-83(2011) (footnotes omitted). As a direct result of the verdict of Count No. I, open murder; we find him not guilty. (T III, p 16). All other charges being directly related to the open murder charge become nil and void. It is an absurdity to charge a person with a felony firearm when, that person was not present, that person was not identified, that person was not in possession of a firearm, that same person was acquitted of a crime that made it necessary to have a firearm.

"In assessing a motion for a directed verdict of acquittal, a trial court must consider the evidence presented by the prosecution to the time the motion is made and in a light most favorable to the prosecution, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). A defendant is entitled to "a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction." *People v Szalma*, 487 Mich 708, 720; 790 NW2d 662 (2010), quoting MCR 6.419(A). Mr. Beck was entitled to a directed verdict on all six charges presented to the jury. "Identity is an element of every offense." *People v Yost* 278 Mich App 3412,356(2008). because there was insufficient evidence presented to support any charge.

The jury in fact did not find proof beyond a reasonable doubt they acquitted him of open murder, possession of a firearm open murder, going armed with a dangerous weapon with unlawful intent, possession of a firearm, going armed with a dangerous weapon with unlawful intent, and convicted him on felon in possession and felony firearm. However, the conviction on the lesser offenses does not render harmless the trial court's erroneous submission of the charges to the jury.

In *Graves*, supra, p 476. The *Vail* decision had held it reversible error in all cases where the trial judge submitted a charge to the jury unsupported by legally sufficient evidence, regardless of which lesser included offense the jury had convicted. The Court in *Graves* held this situation is instead subject to the harmless error standard announced in *People v Gearns*, 457 Mich 170; 577 NW2d 422 (1998), overruled by *People v Lukity*, 460 Mich 484 (1999). The *Graves* Court noted, however, that while the automatic reversal rule of *Vail* was being discarded,

the fact a jury acquits on the erroneously submitted charged offense and convicts only on a lesser offense does not automatically lead to a conclusion of harmless error:

> If, however, sufficiently persuasive indicia of jury compromise are present, reversal may be warranted in certain circumstances. That is to say, a different result may be reached, under a *Gearns* review, where the jury is presented an erroneous instruction, and: 1) logically irreconcilable verdicts are returned, or 2) there is clear record evidence of unresolved jury confusion, or 3) as the prosecution concedes in the alternative, where a defendant is convicted of the next-lesser offense after the improperly submitted greater offense." *Graves,* at 487-488.

In *Graves*, the defendant was charged with first-degree murder, but convicted only on manslaughter, with the jury additionally rejecting conviction on second degree murder.

In light of the of deliberations in this case, as well as the jury's note :

THE COURT: Please be seated. I have received a note from the jury that says: "Your Honor, we need clarification on Count VI. We don't understand the criteria to make an informed decision."

Count VI is felony firearm as it relates to felon in possession of a firearm. That could be *confusing* to lawyers, so I can certainly understand why it's *confusing* to jurors. Because to be a felon in possession of a firearm requires you to be a felon, and having a firearm. And then to have another charge that says you had a firearm while you were a felon in possession of a firearm could be *confusing* to people with legal training, let alone a jury. We have discussed this in chambers. Both parties have agreed, both counsel have agreed that I explain to the jury that if he possessed a firearm, and he is a felon, then he would be guilty of count V as well as Count VI.

MR.GRONDA (defense attorney): I think it was just simply if he had a gun he would be guilty of this offense. And that was based on our stipulation that he already committed ---(T III, p 12, 13).

Mr. Becks chances of acquittal were "substantially decreased by the possibility of a compromise verdict." *See People v McPherson*, 84 Mich App 81, 87-88; 269 NW2d 313, 316 (1978)

This Court should find that the submission of the first-degree murder charge to the jury was reversible error in the context of this record. The resulting convictions for felon in possession of a firearm and felony firearm 2nd should be reversed.

In the alternative, trial counsel was ineffective for failing to move for a directed verdict on all charges. Mr. Beck was entitled to a directed verdict because there was insufficient evidence presented for the above mentioned reasons. The directed verdict motion would not have been futile. There was no legitimate strategic reason not to move for a directed verdict on the charges. Failure to bring a directed verdict motion was deficient performance. Additionally considering all the above counsel was also deficient and prejudiced Mr. Beck even further when he failed to Motion for a New trial. **Rule 6.431 New Trial**

> (A) Time for Making Motion.
> (1) A motion for a new trial may be filed before the filing of a timely claim of appeal.
> (2) If a claim of appeal has been filed, a motion for a new trial may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).
> (3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion for a new trial may be filed within 6 months of entry of the judgment of conviction and sentence.
> (4) If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500.
> (B) Reasons for Granting. **On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage**

> **of justice.** The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record.

Trial Counsel was abundantly aware that the evidence presented was inherently deficient and he elaborates on this in his closing argument:

"So here we are, trying to decide if a man is guilty of the most serious crime. Does anyone else find it concerning that we heard, at most, four hours of live testimony? That we did not see a single piece of physical evidence. I agree with Mr. Boyd that this case isn't simple. It absolutely is not a simple case. Half of the testimony was useless. The other half was completely confusing and contradictory. Mr. Boyd's case wasn't simple, it was shorthanded. I don't think we heard much because I don't think he had much to offer.

Mr. Beck was prejudiced as his conviction was likely the result of a compromise verdict. This Court should find trial counsel's failure to make a directed verdict motion amounted to ineffective assistance of counsel and reverse Mr. Beck's conviction.

ARGUMENT

III. DEFENDANT-APPELLANT ERIC BECK WAS DENIED HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW BY ADMISSION OF THE IRRELEVANT AND HIGHLY PREJUDICIAL AND CONFUSING 911 RECORDINGS AND RECORDED AUDIO TRANSCRIPTS OF A DECEASED WITNESSES PRELIMINARY EXAMINATION TESTIMONY. IN THE ALTERNATIVE, MR. BECK WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO OBJECT AND FAILURE TO FILE PRETRIAL MOTIONS TO HAVE WITNESS TESTIMONY SUPPRESSED.

Issue Preservation

At around 11:30 pm on June 11, 2013 there was a reported shooting of Hoshea Pruitt. Mary Loyd Deal called 911 to notify them that she heard gunshots outside of her house and that someone was shot. It's hard to ascertain a great deal of what was said and not said, therein lies the crux. Trustworthiness of Mary Loyd Deal and just about everything she had to say, 911 calls, to the detectives and during the preliminary examination. It is absurd perhaps even tragic that prosecution would try to take advantage of the mental and physical depravity of Mary Loyd Deal.

It is also tragic that defendant's defense counsel did little more than accommodate the prosecution in its ploy to get Mary Loyd Deal in her vulnerable state to make a case against Mr. Eric Beck. Mary Loyd Deal was subpoenaed to court for the Preliminary examination, as a prosecutors witness, where she made an appearance to testify in an incredibly bad state of health. Mary Loyd Deal was wheeled into court on a hospital gurney (bed), and had to loll her head over to the side to get near a microphone so she could barely be heard. **Prosecutor Mr. Boyd**: "I would say this your Honor, if you take the entire context of what the circumstances were, here is

a picture of her in the gurney. We have taken the microphone here and it's right up to her. I actually, when I was asking questions, had to come on this side of her, to the left of the photograph, so that she could turn her head and speak because the first few answers here you can't even hear because she is that weak". (T I, p 118).

Mary Loyd Deal unfortunately passed away 2 weeks after giving her preliminary examination testimony, and was not available to testify for trial. There are defendant rights that are explicitly bound and it's the guarantee of trustworthiness of the statements made by a witness at the time of them being made, it is a known legal fact that if mental capacity is lacking, so are the guarantees of trustworthiness. Since it is a Judges duty who must determine whether the requisite guarantees exist, he should have been able to determine that Mary Loyd Deal did not possess the requisite capacity, and therefore she was not credible. Additionally both defense attorneys for Mr. Beck should be held culpable for their negligence in allowing any testimony from Mary Loyd Deal to be presented to a Jury.

Mary Loyd Deal

(Witness for the Prosecution)

The following colloquy is to illustrate numerous violations of Mr. Becks protected rights. Especially the most sacred in this instance, Mr. Beck was denied his right to a fair trial by the admission of the testimony of Mary Lloyd Deal. Both the due process guarantees of the Michigan and United States constitutions require fundamental fairness in the use of evidence against a criminal defendant. Const 1963, art 1, § 17; US Const, Am XIV. *See generally, Lisenba v California,* 314 US 219; 62 S Ct 280; 86 L Ed 166 (1941).

THE RECORD

(1)Prosecutor BOYD opening statements: "What I anticipate you are going to hear is the prior testimony of a witness, an eyewitness to the crime, who testified previously and had now passed away from cancer. And you are going to hear that witness's testimony. Is there anyone here who feels that you really need to have her on the witness stand before you can consider, and give her testimony full weight?"(T I, p 50).

JUROR No. 23: "I would have to say that I would take it with a grain of salt simply because if this person knew that she was going to succumb to cancer, it might persuade her to say something that maybe is not the truth. So I mean I would say that it would be a lot better if she were here, but I would have to take something like that with a grain of salt."(T I, p 50)

(2)MR. BOYD: But there are some witnesses who actually saw it happen. One of them, as you were told, is deceased". (T I, p 105)

(3)MR. Boyd: Her testimony is very emphatic at places. And at other places her testimony is as you might expect someone who is suffering from cancer. You will have to judge her testimony. And I am going to be frank with you, okay, there is a little bit of confusion there. She is confused on the details. But consider her physical stature at the that time." (T I, p 107)

(4)Defendants Attorney MR. GRONDA: Now, there are four main witnesses, but there is only one key witness. That is Mary Loyd Deal."... "This case—and I think I can fairly say it, is based on her testimony , almost entirely."(T I, p 110,111)

(5) Cross examination of Officer **DANIEL HERNANDEZ**: **Q**: What did she tell you? **A**: I just asked her If she knew what happened, and she said she heard three to four shots which sounded like they came from the front of her house. And when she looked out all she saw was the victim lying on the sidewalk. **Q**: She didn't tell you anything else? **A**: That is all she told me, sir." (T I, 201)

(6) MR.GRONDA: "Now, I don't know that I need to go through Ms. Deal's testimony line by line. I don't need to explain to you how bizarre her testimony really was. You heard it. If you think you need to hear it again you can talk to the Judge and he will give it to you. But if you feel like you need to review her transcript line by line I guess I would point out a few things. Don't just consider her confusing words."(T I, p 98)

(7)MR.GRONDA: "We all know that Ms. Deal's testimony is totally confused. We know that she changed her story."(T I, p 103)

(8)Prosecutor MR.BOYD: "A lady comes to court on a gurney, brought by an ambulance. I told you before she was going to have some inconsistencies, and she did."(T I, p 106)

(9)Prosecutor MR.BOYD: "And maybe she did make another call, maybe she didn't. I don't know. I just don't know. I never looked into it. So that is just a detail there that is kind of thrown out as a red herring, it doesn't mean anything because what if she did? What if she didn't? Does it make a difference on who she saw? Does it make a difference on who had the gun? Does it make a difference on who shot and killed somebody else? No." (T I, p 110)

(10)THE COURT: "All in all, how reasonable does the witness's testimony seem when you think about all the other evidence in the case?"(T I, p 116)

(11)THE COURT: "The testimony of Mary Loyd Deal was read into this trial because she was not available- - actually it wasn't read, you heard it live through her testimony in court at an earlier proceeding, tape recorded - -.(T I, p 120)

(12)THE COURT: "They want her transcript. We have discussed it in chambers. There is no transcript that has been admitted. We have decided the best way to do it would be to play the entire testimony back to them in the courtroom tomorrow morning." (T I, p 134)

January 30th Day II trial

(Mary Loyd Deal -cont-)

(13)THE COURT: All right. Raise your hand if you can't hear or see. I won't be able to see your hand, but raise it anyhow. Somebody will tell me. (Preliminary examination of Mary Loyd Deal. Played, 11:13 AM)****(Jury excused, 11:29 AM) **THE COURT**: The jury has been excused. Mr. Boyd indicated that there was a technical problem." (T II, p 50)

(14) Direct examination of lead detective BRIAN OBERLE: **Q**: What was her condition at the time that you met with her? **A**: Like I said, she was physically able to drive herself, walk, and everything was okay. She did indicate she had some health issues, but physically at that point, *compared to when I saw her again here in court, a huge difference*."(T II, p 61)

(15) Direct examination continued detective BRIAN OBERLE: **Q** You saw her both at that time and at the time of the preliminary examination in August? **A**: Yes, sir. **Q**: Could you

compare her physical stature at both times? **A**: Yes. Her physical stature deteriorated substantially" (T II, p 75)

(16)THE COURT: And we can't get into whether she was on pain meds or not without having a doctor here. And those people aren't listed as witnesses."(T II, p 77)

(17) Prosecutions CLOSE: Now, who is the other witness in this case? Mary Loyd Deal. Now she, of course, had some contradictions in her testimony."... "And, you now she was very tired during her testimony. You could tell that in the inflection of her voice."(T II, p 88)

January 31 Day III Trial

(Mary Loyd Deal *finale*)

(18)THE COURT: You have asked for the transcript, and we discussed that yesterday, that we will play her testimony for you. We are not -- nobody here is going to be having any comment, because this is now your deliberations. So you're entitled to review the entire testimony. You are entitled to ask to have it played back, if there are certain parts you want to hear over, or if there is just one part of it you want to hear, we can do it that way too. You're holding your hands out widely. You want the whole -- **JUROR NO. 7**: the entire – **THE COURT**: The whole thing? **JUROR NO. 7**: Yes. **THE COURT**: All right We will begin playing that at this time. (Mary Loyd Deal's testimony played for the jurors in the courtroom during deliberations, 9:27 AM). (T III, p 8)

The entire sequence of Mary Loyd Deals testimony no matter how you cut it, is in direct violation of MRE 403: which clearly states:

Per MRE 403, relevant evidence may be excluded under MRE 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *People v Meissner*, 294 Mich App 438, 451; 812 NW2d 37 (2011), *quoting* MRE 403. "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *People v Blackston,* 481 Mich 451, 462; 751 NW 2d (2008).

Standard of Review

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). The trial court abuses its discretion by choosing an outcome outside the range of principled outcomes. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). Questions of law, such as the applicability of a particular rule of evidence, are subject to de novo review. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Claims of ineffective assistance of counsel are reviewed de novo under the two-part analysis established in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Ineffectiveness claims present mixed questions of law and fact. *Strickland*, at 698; *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of law are reviewed de novo while questions of fact are reviewed for clear error. MCR 2.613(C); *LeBlanc*.

Argument

Mr. Beck was denied his right to a fair trial when the jury was exposed to several instances of testimony and multiple layers of hearsay testimony by Mary Loyd Deal. All

defendants enjoy a due process right to a fair trial undeterred by inadmissible and unfairly prejudicial evidence. US Const, Am V, VI, XIV; Const 1963, art 1, §§ 17, 20. An important element of a fair trial is that only relevant and competent evidence is introduced against the accused. *Bruton v United States*, 391 US 123, 131; 88 S Ct 1620; 20 L Ed 2d 476 (1968). This right requires a fair trial of the issues involved in the particular case and a determination of disputed questions of fact on the basis of only properly admitted evidence. *Napuche v Liquor Control Comm*, 336 Mich 398, 403; 58 NW2d 118 (1953).

Mary Loyd Deals testimony was entirely irrelevant and substantially more prejudicial and confusing. Evidence that is not relevant is inadmissible. MRE 402. Relevant evidence means evidence having a tendency to make any fact of consequence to the action more or less probable than without the evidence. The trial court abused its discretion by allowing the jury to hear the testimony of Mary Loyd Deal.

In the alternative, Mr. Beck was denied his right to effective assistance of counsel by his trial attorney's failure to object. A criminal defendant has the right under the federal and state constitutions to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *Strickland.*

To prevail on an ineffective assistance of counsel claim, a defendant must first meet two criteria. He must first "show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, at 687. In so doing, the defendant must rebut a presumption that counsel's performance was the result of sound trial strategy. *Id.* at 690. Second, the defendant must show that the deficient performance was prejudicial. *Id.* at 687. Prejudice is

established where there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694; *LaVearn*, at 216.

Failure to object to evidence can constitute ineffective assistance of counsel where the evidence was inadmissible and its introduction was so prejudicial that it could have affected the outcome of the case. *People v Ullah*, 216 Mich App 669, 685-686; 550 NW2d 568 (1996). Allowing Mary Loyd Deals 911 calls and preliminary examination testimony was highly prejudicial. Failure to object could not be deemed as strategy. Any concerns about appearing argumentative or "difficult" in front of the jury by objecting could be minimized by asking to approach or by filing a motion in limine to exclude the irrelevant and inadmissible evidence. This Court should vacate Mr. Beck's conviction and grant him a new trial. In the alternative, this Court should remand for a hearing pursuant to *People v Ginther*.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court grant leave to appeal.

Respectfully submitted,

Eric Lamontee Beck

BY: Eric L Beck

ERIC LAMONTEE BECK
In Pro Per
St. Louis Correctional Facility
8585 N. Croswell Rd
St. Louis, Michigan 48880

Dated: January 11, 2016

152934

Attachments to Supplement

ATTACHMENT 1

(Excerpts from Sentencing transcripts)

credit?

MR. BOYD: No objection.

THE COURT: This was set last week, previous, is that correct?

MR. GRONDA: No, Your Honor, this report was actually authored about a month and a half ago, so 268 days would be our calculation.

THE COURT: The Court is going to, on that count, sentence you to five years with credit for 268 days. That material is to be consecutive to, and preceding the count, the previous count of felon in possession of a firearm.

With respect to that charge the Court does find that there are compelling reasons to go over the guidelines. The Court believes that the -- to sentence within the guidelines would not be proportionate to the seriousness of the defendant's conduct or the seriousness of his criminal history. And for that reason the Court is going to go over the guidelines in setting a sentence that is, in fact, proportionate to those things.

In addition to that, the maximum -- when you reach the maximum on the guidelines in this case it's at 75 points, this is way over that at 125 points. That is another reason the Court may, and will go over

The Court is going to go over the guidelines in setting the minimum sentence in this matter. And the Court will set a minimum sentence of 240 months, a maximum of 400. There is no credit since the credit gets added onto Count II, the felony firearm.

You have an absolute right to appeal your conviction and sentence. You must request -- if you're unable to afford a lawyer you must make that request within 42 days. We will give you an advice of rights as to your appellate rights. Sign the original, copies will be provided, and they will explain in more detail what your rights are.

And there is a Crime Victim's fee on Count I -- State costs of $68, Crime Victim's assessment of $130. And on Count II there is $68 State cost.

MR. GRONDA: Your Honor, one final matter just because this matter is certain to be appealed. I just want to make sure I am absolutely clear so I can explain to Mr. Beck after this hearing the reason that the Court is exceeding the guidelines.

If I am correct -- and absolutely please correct me if I'm wrong -- number one, you are exceeding the guidelines because you found that the OV variables were 173 percent of the maximum.

Number two, you are exceeding the guidelines

ATTACHMENT 2

(Court of Appeals Decision)

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC LAMONTEE BECK,

Defendant-Appellant.

UNPUBLISHED
November 17, 2015

No. 321806
Saginaw Circuit Court
LC No. 13-039031-FC

Before: BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. He was acquitted of murder, carrying a dangerous weapon with unlawful intent, and two felony firearm charges. The trial court departed from the recommended sentencing range under the now-advisory legislative guidelines and sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to 240 to 400 months' imprisonment for the felon in possession conviction and to a consecutive sentence of 5 years' imprisonment for the felony firearm conviction. Defendant appeals as of right. We affirm defendant's convictions. However, in light of *People v Steanhouse*, __ Mich App, __; __ NW2d __ (2015), we remand for a *Crosby*[1] hearing.

On June 11, 2013, Hoshea Pruitt was shot to death. Mary Loyd-Deal, a witness who died before trial, saw the shooting and identified defendant as the shooter in her preliminary examination testimony, which was presented to the jury. Loyd-Deal explained that defendant shot Pruitt after a verbal altercation about a woman named Rajeana Drain. The shooting was also witnessed by Jamira Calais. Although Calais could not identify defendant, she testified that she saw a man in a black shirt run across the street after a man in a white shirt was shot three or four times. She saw the man with the black shirt with a gun. The prosecution also presented testimony from Aaron Fuse, who testified that defendant called him a couple of days after Pruitt's death and told Fuse that he had done "something stupid" and shot someone while arguing about a woman.

[1] *United States v Crosby*, 397 F3d 103 (CA 2 2005).

Defendant was charged with murder, carrying a dangerous weapon with unlawful intent, felon in possession of a firearm, and three counts of felony-firearm. As noted, the jury convicted defendant of felon in possession of a firearm and one count of felony-firearm, but returned a verdict of not guilty with respect to murder, carrying a dangerous weapon with unlawful intent, and the remaining two counts of felony-firearm. Defendant's recommended minimum sentencing range under the legislative guidelines as a fourth-habitual offender, MCL 769.12, was 22 to 76 months for felon in possession of a firearm. The trial court departed upward from this range and sentenced defendant to 240 to 400 months' imprisonment for felon in possession of a firearm, which was to be served consecutively to a 5 year sentence for felony-firearm. Defendant now appeals as of right.

I. SENTENCING

On appeal, defendant raises several challenges regarding the sentence imposed. First, defendant contends that the trial court impermissibly engaged in judicial fact-finding that increased the floor of his minimum sentencing range in violation of *Alleyne v United States*, __ US __; 133 S Ct 2151; 186 L Ed 2d 314 (2013). Specifically, defendant asserts that the trial court's scoring of offense variables required the trial court to find facts beyond those established by the jury. Based on this required judicial fact-finding, defendant claims that he is entitled to resentencing.

Defendant failed to raise this judicial fact-finding argument regarding of the scoring of offense variables in the trial court, meaning that his *Alleyne* claim is unpreserved and reviewed for plain error affecting his substantial rights. See *People v Lockridge*, __ Mich __, __; __ NW2d __ (2015), slip op at 30. Recently, in *Lockridge*, the Michigan Supreme Court determined that Michigan's sentencing guidelines violate the Sixth Amendment right to a jury trial insofar as they require a sentencing judge to find facts at sentencing that mandatorily increase the floor of the recommended minimum sentencing range under the legislative guidelines. *Id.*, slip op at 1-2. To remedy this constitutional defect, the *Lockridge* Court held that the sentencing guidelines are now "advisory." *Id.* at 36. However, while declaring the guidelines advisory, the *Lockridge* Court specified that an unpreserved claim of *Alleyne* error was subject to plain error analysis and that, under this standard of review, a defendant who received a minimum sentence that is an upward departure cannot show plain error "because the sentencing court has already clearly exercised its discretion to impose a *harsher* sentence than allowed by the guidelines and expressed its reasons for doing so on the record." *Id.*, slip op at 30 & n 31. "It defies logic that the court in those circumstances would impose a lesser sentence had it been aware that the guidelines were merely advisory." *Id.* Consequently, in this case, because defendant's sentence was an upward departure, he cannot show plain error and he is not entitled to resentencing on the basis of judicial fact-finding regarding offense variables. See *id.*

Next, with respect to sentencing, defendant also argues that the trial court could not consider Pruitt's death when imposing a sentence because the jury found defendant not guilty of homicide. Contrary to these assertions, it is well-settled that a trial court may consider *all* the evidence admitted at trial when determining the appropriate sentence. See *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995). Indeed, a trial court may consider even acquitted conduct during sentencing, provided that the facts are proven to the judge by a preponderance of the evidence. See *People v Ewing*, 435 Mich 443, 451-452; 458 NW2d 880 (1990) (opinion by

BRICKLEY, J.); *id.* at 473 (opinion by BOYLE, J.); *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). Consequently, in this case, we see nothing improper in the trial court's consideration of defendant's role in Pruitt's death when crafting an appropriate sentence. The evidence introduced at trial included Loyd-Beal's identification of defendant in her preliminary examination testimony along with other evidence establishing defendant's identity as the shooter by a preponderance of the evidence. Thus, the trial court was free to consider defendant's responsibility for Pruitt's death as a circumstance surrounding defendant's conduct when imposing the sentence for defendant's felon in possession conviction.

Regarding the sentence imposed, defendant also contends that the trial court failed to justify the departure with substantial and compelling reasons. After defendant filed his appellate brief in the present case, our Supreme Court reached a decision in *Lockridge*, which, as described above, rendered the previously mandatory sentencing guidelines "only advisory." *Lockridge*, slip op at 36. Relevant to defendant's current arguments on appeal, in holding that the guidelines were now "advisory," the Court specifically struck down the requirement that a trial court articulate substantial and compelling reasons to depart from the guidelines range as previously required under MCL 769.34(3). *Lockridge*, slip op at 29. Consequently, following *Lockridge*, we no longer consider whether a trial court articulated substantial and compelling reason to justify a departure; rather, a departure sentence will be reviewed on appeal for "reasonableness." *Id.* Sentencing courts must still articulate justification for the departure sentence in order to facilitate appellate review; but resentencing will only be required when a sentence is determined to be "unreasonable." *Id.*

The *Lockridge* Court did not elaborate on the meaning of "reasonableness." The phrase was, however, recently considered by a panel of this Court. Specifically, in *People v Steanhouse*, this Court considered two possible approaches to understanding "reasonableness," and concluded that *Lockridge*'s adoption of a reasonableness standard heralded a return to the proportionality principles in place before the enactment of the legislative guidelines as set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990) and its progeny. See *People v Steanhouse*, __ Mich App __, __; __ NW2d __ (2015), slip op at 23-24. Under this standard, we apply a "'principle of proportionality' test in order to determine whether a trial court abuses its discretion in imposing a sentence." *Id.* at 23, citing *Milbourn*, 435 Mich at 634-636.

The principle of proportionality requires a trial court to impose a sentence that takes "into account the nature of the offense and the background of the offender." *Id.*, quoting *Milbourn*, 435 Mich at 651. In this context, the sentencing guidelines serve as an advisory "barometer," that assists the trial court in placing a given case on the "continuum from the least to the most threatening circumstances." *Id.*, quoting *Milbourn*, 435 Mich at 656-657. The trial court has discretion to depart from the sentencing guidelines when the trial court concludes that the guidelines are disproportionate to the seriousness of the crime. *Id.*, citing *Milbourn*, 435 Mich at 656-657. The court may consider a variety of factors when sentencing, including among others, (1) the seriousness of the offense; (2) factors not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation, and (3) factors that were inadequately considered by the guidelines in a particular case. *Id.* at 24 (citation omitted).

On appeal, we review the trial court's sentencing decision for an abuse of discretion, and a trial court will be said to have abused its discretion "if that sentence violate[d] the principle of proportionality, which require[d] sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.* at 23, quoting *Milbourn*, 435 Mich at 636.

> Where there is a departure from the sentencing guidelines, an appellate court's first inquiry should be whether the case involves circumstances that are not adequately embodied within the variables used to score the guidelines. A departure from the recommended range in the absence of factors not adequately reflected in the guidelines should alert the appellate court to the possibility that the trial court has violated the principle of proportionality and thus abused its sentencing discretion. Even where some departure appears to be appropriate, the extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality. [*Id.*, quoting *Milbourn*, 435 Mich at 659–660.]

In this case, the trial court sentenced defendant before the decisions in *Lockridge* and *Steanhouse* were issued. Consequently, the trial court articulated substantial and compelling reasons for departing, rather than focusing on the "reasonableness" of the sentence imposed. In these circumstances, the *Steanhouse* Court determined that a remand for a *Crosby* hearing is the appropriate remedy. *Steanhouse*, slip op at 25. Resentencing is not necessarily required incident to a *Crosby* hearing; rather, at a *Crosby* hearing the sentencing court, now fully informed of the new sentencing regime, determines whether or not to resentence. *Lockridge*, slip op at 33-36, citing *Crosby*, 397 F2d 117-118. In other words, "the purpose of a *Crosby* remand is to determine what effect *Lockridge* would have on the defendant's sentence, so that it may be determined whether any prejudice resulted from the error." *People v Stokes*, __ Mich App __, __; __ NW2d __ (2015), slip op at 11. Under the new sentencing regime now in place, a defendant may face a more severe sentence at resentencing and, for this reason, a defendant is provided with an opportunity to avoid resentencing by promptly notifying the trial judge that resentencing will not be sought. *Id.* at 11-12. Consequently, in keeping with *Steanhouse*, we remand this case for a *Crosby* hearing following the procedures set forth in *Lockridge*. *Steanhouse*, slip op at 25. Defendant may elect to forego resentencing and must promptly notify the trial court of this decision. *Id.* "If notification is not received in a timely manner, the trial court shall continue with the *Crosby* remand procedure as explained in *Lockridge*." *Id.* (citation and quotation marks omitted).

II. DEFENDANT'S STANDARD 4 BRIEF

In a Standard 4 brief, defendant raises three additional arguments. First, relying on MCL 769.11b, defendant argues that he was denied credit for 268 days served before his convictions. Contrary to defendant's argument, the judgment of sentence clearly indicates that he was credited with 268 days in relation to his felony-firearm conviction. Defendant appears to believe that he was also entitled to this credit in relation to his felon in possession sentence or that, alternatively, the credit should have instead been applied to his felon in possession sentence rather than his felony-firearm sentence. But, as noted, defendant's sentences are consecutive, not concurrent, and in these circumstances the jail credit was properly applied only to the felony-

firearm sentence which, according to the judgment of sentence, is to precede his felon in possession sentence. See *People v Cantu*, 117 Mich App 399, 402-404; 323 NW2d 719 (1982).

Second, defendant argues that the evidence was insufficient to sustain his convictions beyond a reasonable doubt. Specifically, defendant contends that the prosecution presented no evidence to establish that defendant was present at the scene or that he possessed a gun. Further, defendant claims that, because the jury found him not guilty of murder, they could not convict him of felon in possession or felony firearm. Defendant also argues that trial counsel provided ineffective assistance by failing to move for a directed verdict or a new trial.

We review de novo a challenge to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). When determining whether the prosecutor presented sufficient evidence to sustain a conviction, we consider the evidence in a light most favorable to the prosecutor to ascertain whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010). Direct evidence as well as circumstantial evidence and reasonable inferences arising therefrom can constitute satisfactory proof of the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). It is for the jury to determine witness credibility and to resolve any inconsistencies in the testimony; and, this Court will not interfere with the jury's role as fact-finder. *People v Harverson*, 291 Mich App 171, 175, 179; 804 NW2d 757 (2010). Rather, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Nowack*, 462 Mich at 400.

In this case, defendant does not dispute that he was a felon ineligible to possess a firearm, and he does not dispute that someone at the scene possessed a firearm. Instead, defendant essentially argues that there was no evidence that he was identified as present during the crime or as being the person in possession of the gun. Defendant is correct in his assertion that identity is an element of every offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). However, contrary to defendant's arguments, there was sufficient evidence to establish his identity as the individual in possession of a gun at the scene. Calais, who was behind a turquoise car, saw an unidentified man shooting a gun before running away. Loyd-Deal stated that she saw defendant get out of a car that was the same color as the one in front of Calais. Loyd-Deal identified defendant as the man having a heated argument with Pruitt regarding Drain. And, most notably, Loyd-Deal testified that, after she heard a shot fired, she went to her window and she saw defendant shoot Pruitt three times. Indeed, Loyd-Deal testified that she saw defendant with a gun more than once during the incident. Fuse testified that defendant called him a couple days after Pruitt died and that, consistent with Loyd-Deal's description of events, defendant told Fuse that he did something stupid and shot "someone" while arguing with a man over a girl. Thus, it was reasonable for the jury to conclude from the evidence presented that defendant was at the scene and in possession of a gun. Although on appeal defendant highlights inconsistencies in the evidence and in Loyd-Deal's testimony in particular, these issues were for the jury to resolve.[2] See *Harverson*, 291 Mich App at 175, 179. Viewed in a light most favorable to the

[2] There is also no merit to defendant's assertion that his convictions were not supported by sufficient evidence simply because the jury returned a not guilty verdict with respect to open

prosecution, the direct and circumstantial evidence, as well as all reasonable inferences that may be drawn, was sufficient to support defendant's convictions beyond a reasonable doubt. See *Nowack*, 462 Mich at 400.

Insofar as defendant asserts that trial counsel provided ineffective assistance by failing to move for a directed verdict or a new trial, his claims are without merit. To establish a claim of ineffective assistance of counsel a defendant must show "(1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014) (quotation marks and citations omitted). The effective assistance of counsel is presumed, and the defendant bears the heavy burden of proving otherwise. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Counsel is not considered ineffective for failing to make meritless arguments or for failing to pursue a futile motion. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003); *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

In this case, defendant argues that his trial counsel provided ineffective assistance because he did not move for a directed verdict. However, such a motion would have been futile because the evidence discussed above, along with the physical evidence that Pruitt died of a homicide after he was shot at close range, provided a basis for a reasonable juror to convict defendant of the crimes for which he was charged, including murder. Counsel was not ineffective for failing to make a futile motion. *Riley*, 468 Mich at 142.

Finally, defendant argues that the trial court abused its discretion by admitting Loyd-Deal's preliminary examination testimony and her 911 call at trial.[3] Specifically, defendant

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murder. Although it is not entirely clear from defendant's argument, it appears to be his contention that there is some inconsistency in the verdicts that renders his convictions infirm. But, even supposing that there was some inconsistency in the verdicts, this would not entitle defendant to relief because "inconsistent verdicts within a single jury trial are permissible." *People v Wilson*, 496 Mich 91, 100; 852 NW2d 134 (2014). Moreover, in this case, the jury's verdicts are not necessarily inconsistent. The jury could have found credible Loyd-Deal's testimony that defendant was present with a gun while at the same time they might have had reasonable doubts about Loyd-Deal's statement that she saw defendant shoot Pruitt given that she also testified that she was in the kitchen on the phone when she initially heard shots fired.

[3] Insofar as defendant challenges the admission of Loyd-Deal's 911 call, defendant waived any error in this regard because it was defense counsel who introduced Loyd-Deal's 911 call into evidence at trial. "Defendant may not assign error on appeal to something that his own counsel deemed proper at trial." *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). Further, decisions regarding what evidence to present are matters of trial strategy, *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008), and it is clear that counsel was not ineffective for introducing this evidence because counsel used the 911 call to discredit Loyd-Deal's testimony by asserting that she did not identify defendant during the 911 call as the shooter when events were "still fresh in her mind" and that she instead "developed the story about [defendant] after the fact." We need not consider the 911 call further.

categorizes the evidence as inadmissible hearsay, he contends that Loyd-Deal was lacking the requisite mental capacity when she testified at the preliminary examination due to her poor health and, relying on MRE 403, defendant contends that this evidence was irrelevant and unfairly prejudicial. Defendant also argues that his trial counsel was ineffective in failing to object to the admission of this evidence or to file a motion in limine for the exclusion of this evidence.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Duncan*, 494 Mich 713, 722; 835 NW2d 399 (2013). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Id.* at 722-723. Preliminary questions of law, including whether a rule of evidence precludes admissibility of evidence, are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Id.*

In this case, contrary to defendant's arguments, Loyd-Deal's testimony was plainly relevant. She was present at the scene, she observed defendant with a gun, and she testified that she saw defendant shoot Pruitt three times. Her testimony thus constituted evidence making it more probable that defendant was in possession of a gun and that he killed Pruitt. Because Loyd-Deal's testimony was relevant to facts of consequence, it was generally admissible. See MRE 401; MRE 402. Further, although Loyd-Deal's preliminary examination testimony constituted hearsay, see MRE 801, it was nonetheless admissible because Loyd-Deal was unavailable at trial and she testified at the preliminary examination, during which defendant had an opportunity and similar motive to develop her testimony on cross examination. See MRE 804(a)(4); MRE 804(b)(1).

Nonetheless, defendant claims Loyd-Deal's testimony was inadmissible because she was mentally incompetent. In support of this argument, defendant notes that Loyd-Deal testified during the preliminary examination from a hospital bed in the courtroom. Although it would appear that Loyd-Deal was in poor physical health at the time of the examination, and in fact died shortly thereafter, it is nonetheless true that "a witness is presumed to be competent to testify." *People v Flowers*, 222 Mich App 732, 737-738; 565 NW2d 12 (1997). Under MRE 601, "[u]nless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules." See also *People v Breck*, 230 Mich App 450, 457; 584 NW2d 602 (1998). There is no indication that Loyd-Deal lacked this capacity and the mere fact of her poor health does not, on its own, render her incompetent within the meaning of MRE 601.[4]

[4] Insofar as defendant claims counsel should have objected to Loyd-Deal's testimony on this basis, we note that it is defendant's burden to establish the factual predicate for his claim. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Without evidence to support the assertion that Loyd-Deal was incompetent within the meaning of MRE 601, there is no factual support for defendant's claim that counsel provided ineffective assistance of counsel by failing to

In addition, defendant argues that her testimony should have been excluded because it was unduly prejudicial and confusing. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403. See also *People v Musser*, 494 Mich 337, 356; 835 NW2d 319 (2013). Unfair prejudice exists when there is a tendency that the marginally probative evidence will be given undue or preemptive weight by the jury. *People v Mardlin*, 487 Mich 609, 627; 790 NW2d 607 (2010). We have no such concerns in the present case. Here, the testimony had significant probative value as substantive evidence of the crimes for which defendant was charged. It was certainly prejudicial to the extent that the jury could have relied on it to identify defendant as the perpetrator of the crimes; but, in this regard, "[a]ll relevant evidence is prejudicial," and we see nothing *unfairly* prejudicial in this evidence which would require its exclusion. See *People v McGhee*, 268 Mich App 600, 613-614; 709 NW2d 595 (2005). Nor can we discern any basis for concluding that the evidence was so confusing as to substantially outweigh the significant probative value of the evidence. Consequently, the trial court did not abuse its discretion by admitting Loyd-Deal's testimony.

Having concluded that the trial court did not abuse its discretion by admitting Loyd-Deal's testimony, we also reject defendant's assertion that his trial counsel was ineffective for failing to object to the admission of this testimony based on the various reasons asserted by defendant on appeal. First, the decision to object is typically considered a matter of trial strategy, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004), and in this case the record shows that counsel did raise objections to portions of Loyd-Deal's testimony and that counsel succeeded in having some of her testimony redacted before it was presented to the jury. Second, overall, the testimony that was ultimately admitted was admissible for the reasons discussed *supra* and counsel cannot be considered ineffective for failing to make meritless objections or for failing to pursue a futile motion in limine. See *Riley*, 468 Mich at 142; *Ericksen*, 288 Mich App at 201.

We affirm defendant's convictions, but remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Henry William Saad
/s/ Joel P. Hoekstra

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object to her testimony on this basis. Thus, defendant's ineffective assistance of counsel claim must fail. See *Carbin*, 463 Mich at 600-601.